

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>WEST-HERR FORD, INC.</b>	:	DETERMINATION
	:	DTA NO. 818510
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period June 1, 1997 through May 31, 2000.	:	

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Petitioner, West-Herr Ford, Inc., S-5025 Camp Road, Hamburg, New York 14075, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1997 through May 31, 2000.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 77 Broadway, Suite 112, Buffalo, New York, on February 6, 2002 at 10:30 A.M., with briefs to be submitted by June 7, 2002, which date began the six-month period for the issuance of this determination. Petitioner appeared by Gary J. Gleba, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Dennis A. Fordham, Esq., of counsel).

***ISSUE***

Whether cars leased by petitioner from a third party were leased for resale to petitioner's own customers.

***FINDINGS OF FACT***

1. As a result of a sales tax field audit, the Division of Taxation ("Division") issued to petitioner, West-Herr Ford, Inc. ("W-H"), a Notice of Determination, dated March 13, 2001,

assessing sales tax due in the amount of \$130,485.93 for the period June 1, 1997 through May 31, 2000 plus interest and penalty.<sup>1</sup>

2. W-H operates a Ford automobile dealership, selling and servicing new and used automobiles. On audit, W-H produced all of the books and records requested by the Division's auditors, and those books and records were found adequate for the purposes of conducting a complete audit of W-H's books and records. W-H executed a Test Period Method Election form enabling the Division to conduct an audit of sales and recurring expenses based on a test period.

3. Based on the test period audit, the Division determined additional tax due for the audit period of \$160,438.46. W-H disagreed only with that portion of the audit resulting from sales tax assessed on charges paid by W-H for its rental of vehicles used as loaner cars. It paid the agreed portion of the tax assessment in the amount of \$29,952.53 leaving a tax due of \$130,485.93, all of it attributable to charges for rental cars. W-H does not dispute the calculation of tax due on the rental vehicle charges; rather, it contends here, as it did on audit, that these vehicles were rented for resale and, as such, the charges were not subject to sales tax.

4. In general, W-H made loaner cars available to service and repair customers who had purchased a new automobile from W-H and to customers who had purchased a new or used automobile and an Extended Service Plan contract on that automobile.

5. A customer purchasing a vehicle from W-H pays sales tax on the agreed net price which includes the cost of the vehicle's basic warranty. Customers purchasing a new Ford vehicle receive a three-year or 36,000 mile limited warranty from Ford Motor Company ("Ford"). The 1999 Model Warranty Guide is typical of warranty booklets provided to new-car

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<sup>1</sup> Petitioner, by its chief financial officer, executed consents extending the period for assessment of tax due for the period June 1, 1997 through February 28, 1998 to March 20, 2001.

purchasers. It contains the following provisions:

Your NEW VEHICLE LIMITED WARRANTY gives you specific legal rights. You may have other rights that vary from state to state. The New Vehicle Limited Warranty is the only express warranty applicable to your vehicle. Neither Ford or Ford Motor Vehicle Assurance Company assumes nor authorizes anyone to assume for it any other obligation or liability in connection with your vehicle or this warranty.

Ford, Ford Motor Vehicle Assurance Company and your dealer are not responsible for any time that you lose, for any inconvenience you might be caused, for the loss of your transportation, or for any other incidental or consequential damages you may have.

6. The Ford warranty guide provided to customers does not provide for reimbursement of transportation expenses nor does it obligate W-H or the dealer to provide transportation.

7. The warranty guide also states:

**Ford Motor Company** and your selling dealer thank you for selecting one of our quality products. Our commitment to you and your vehicle begins with quality protection and service.

When you need warranty repairs your selling dealer would like you to return to it for that service, but you may also take your vehicle to another Ford Motor Company dealership authorized for warranty repairs.

8. Ford provides its dealers with a Warranty and Policy Manual for use by service departments. This manual spells out the terms of the limited warranty in greater detail than does the guide provided to customers. Two provisions in the manual apply to transportation expenses incurred by the dealer as follows:

**NOTE:** For Ford and Mercury cars and light trucks, alternate transportation in the form of shuttle service or service rentals may be available under the Transportation Assistance Program. Consult with dealership service management for details.

As part of the Lincoln Commitment Program, Lincoln vehicle owners will be provided with transportation assistance for warranty repairs in the form of shuttle service, loaner vehicle, or up to \$35 per day rental assistance.

9. In addition to the basic warranty, new and used car customers may purchase a Ford Extended Service Plan for an additional charge. The application for a Ford Extended Service Plan contract contains the following provisions regarding transportation:

Transportation reimbursement applies only after it has been determined by the repairing dealer that:

1) the repair is covered under this contract; 2) the vehicle is inoperable due to an original factory limited warranty or covered ESP/ESC repair under this contract; and 3) the vehicle must be kept overnight by the repairing dealer.

The rental benefit will be provided for rental charges incurred up to the plan limits while the repair is being completed. The rental vehicle must be rented from the servicing dealership or other commercial agency to be eligible for reimbursement.

The application for contract is not valid until accepted by ESP headquarters.

10. When a prospective customer visited W-H's dealership, he or she was greeted by a sales person and given a description of the vehicles, an explanation of the Ford warranty and information about the benefits of W-H's service department. In the course of negotiating the sale of a new or used vehicle, W-H's salesmen typically advised the potential customer of W-H's car loaner policy. Essentially, customers were told that new car buyers and purchasers of the Extended Service Plan could obtain a loaner vehicle while their car was being serviced at W-H's service department. W-H considers the providing of loaner cars to its customers to be an additional inducement to purchase from W-H.

11. In addition to the car purchase, W-H also provides financing, life insurance, disability insurance and other products to its customers. These additional items may be purchased separately, and they are discussed with potential customers during the course of purchase negotiations.

12. When a customer and W-H arrive at a mutually satisfactory price, the customer is asked to sign a purchase agreement and to make a deposit on the car. The agreement identifies the car sold and the negotiated purchase price. All of the items purchased and additional charges are calculated in a section entitled "Retail." A sample purchase agreement entered into evidence shows the base price of the car, trade-in credit, discounts, an additional charge for the extended service plan, the three-year basic warranty (for no additional charge), sales tax, registration fee, inspection fee, application fee and the total due on delivery. The service loaner policy is not an item stated on the purchase agreement. The purchase agreement is signed by W-H and the prospective buyer. Among other things, it contains the following provision:

5. **Disclaimer of Warranties.** I UNDERSTAND THAT YOU EXPRESSLY DISCLAIM ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND THAT YOU NEITHER ASSUME NOR AUTHORIZE ANY OTHER PERSON TO ASSUME FOR YOU ANY LIABILITY IN CONNECTION WITH THE SALE OF THE VEHICLE, except as otherwise provided in writing by YOU in an attachment to this Agreement or in a document delivered to ME when the vehicle is delivered.

13. When a customer takes delivery on a new car, he or she meets with a business office representative who explains the details of the sale. If pertinent, explanations would be provided of financing arrangements, life insurance, disability insurance and extended service contracts. In addition, W-H's service loaner policy is explained to the customer and the customer is asked to sign a service loaner policy statement. The September 1999 Service Replacement Policy statement is typical of those used during the audit period and provides as follows:

West-Herr provides service replacement rentals through Thrifty Car Rental. West-Herr pays the daily rate but, [sic] you are responsible for the car, as well as, excess mileage (over 150/day), gas used, damage up to \$100.00.<sup>2</sup>

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<sup>2</sup> This paragraph did not appear in the 1997 "Service Loaner Policy."

1. Service Replacement Rentals are only available on appointment basis, and only for the registered owner or spouse.
2. Privileges will remain in effect for the term of your New Vehicle's basic warranty.
3. Rentals **WILL NOT** be provided for collision or insurance related repairs.
4. In the event of an emergency, rentals will be issued on the basis of availability.
5. A rental **MUST** be requested at time of making service appointment.
6. The minimum age is 18. Drivers age 18, 19, or 20 will be required to pay \$51.95 / day Youthful Driver Surcharge to Thrifty Car Rental.
7. Purchasers of used vehicles will only be provided Service Replacement Rentals if they have purchased an Extended Service Plan Contract.
8. A credit reference (credit card or credit check) must be verified prior to rental. Valid Driver's License **MUST** be provided at time of rental.

A signature line appears under these provisions with the following statement under the line: "Signature Acknowledges customer has read and fully understands Restrictions listed above."

14. All documents related to the sale of the vehicle are placed in a "dealer jacket," a type of file folder. The dealer jacket typically contains the purchase agreement, copies of the purchaser's driver's license, financing agreements, life insurance or disability insurance policies, title and registration documents and any other items relevant to the sale. Upon delivery of the car to the customer, a salesman reviews the documents in the dealer jacket with the customer. At that time, the customer is asked to sign the Service Replacement Policy statement, and a copy of it is placed in the dealer jacket.

15. All customer information is entered in the W-H computer database by date of purchase. This information can be accessed by W-H as necessary. When a customer calls to

make an appointment for service, the service department checks the computer system to determine whether the customer is entitled to a service loaner. If the customer has purchased a new car from W-H which is still under warranty or is receiving service under the terms of an extended service plan, a service loaner car is made available.

16. W-H contracted with Thrifty Car Rental Company to provide loaner cars. W-H's contract with Thrifty requires Thrifty to keep cars available for W-H's customers. The contract does not provide for an exact number of cars to be provided. Rather, Thrifty is obligated to provide cars as needed. Thrifty charges W-H approximately \$30,000.00 to \$40,000.00 per month for rental cars provided to W-H customers. Normally, 6 to 12 Thrifty rental cars are on W-H's property at any one time. Thrifty has porters who bring cars to the W-H dealership throughout the day to meet W-H's customer's demands for service loaners. W-H does not have loaner cars of its own on the premises. Rather, the customer is sent to the Thrifty service desk and provided with a car by Thrifty. It is the understanding of W-H's employees that customers who have signed the loaner policy agreement are legally entitled to a loaner car, and every effort is made to insure the loaner cars are made available. Each month, Thrifty provided W-H with an invoice of charges incurred for car rentals. Thrifty did not collect sales tax on the rental charges.

17. Not every customer who is entitled to a loaner car actually receives one at every appointment. Some customers prefer not to have a service loaner. Some use alternative transportation such as a shuttle van provided by W-H or wait at the dealership until their vehicle is serviced. The loaner car is available whether a customer wants it or not. The cost of the loaner policy to W-H is approximately \$100.00 for each new car sold. Even if a customer who did not want to use a loaner car was able to negotiate a \$100.00 reduction in the cost of the new car purchase on that basis, W-H would still make a car available if that customer later demanded one.

18. Ford reimburses W-H for repair work performed under the terms of the basic warranty. Ford does not reimburse W-H for service loaners provided to customers, because they are not a reimbursable item under the basic warranty. Nonetheless, W-H provides its basic warranty customers with service loaners if the vehicle being serviced was purchased from W-H. Customers who purchased a Ford vehicle at another dealership may have basic warranty service performed by W-H. These customers are not provided with a service loaner.

19. Ford reimburses W-H for rental car charges incurred under the terms of the Extended Service Plan. These charges are treated as a warranty item and reimbursed by Ford in the same way that other warranty items are reimbursed.

20. Ford has a transportation assistance program which provides W-H with a set amount of money each year to provide transportation services to its basic warranty service customers. The amount of money provided is determined by a formula based on annual sales. The amount is not directly related to the Thrifty rental car expenses incurred by W-H.

21. During its audit, the Division distinguished between two types of repair services: those performed under the basic warranty and those performed under the Extended Service Plan. It was the Division's understanding after reviewing all pertinent documents that W-H was legally obligated to provide its customers with a service loaner under the terms of the Extended Service Plan. Consequently, charges incurred by W-H for loaner cars provided under the terms of the plan were deemed to be purchases for resale. The Division believed that W-H was not legally obligated to provide a loaner car under the terms of the basic warranty or any other agreement. The Division concluded that charges incurred to provide such cars were operating expenses and not purchases for resale.

22. To determine tax due on Thrifty rental charges for the loaner cars, the Division tested the month of June 1999. It determined that 67% of maintenance and repair work performed



during this month were performed under the terms of the basic warranty. The Division concluded that 67% of the charges incurred for rental cars were connected with new car customers during the term of the basic warranty. Consequently, the Division assessed tax on 67% of W-H's rental car expense for the audit period. W-H does not contest the correctness of this methodology.

23. Petitioner submitted 17 proposed findings of fact. Proposed finding of fact "4" alleges that the service loaner policy is signed at the same time that the purchase agreement is signed. This statement is not supported by the evidence and has not been adopted. Proposed findings of fact "5" and "8" contain conclusions of law; for that reason, they have not been adopted. Proposed finding of fact "7" is deemed irrelevant to the outcome and has not been adopted. The remaining proposed findings of fact have been substantially incorporated into this determination.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

24. Petitioner argues that the Thrifty car rentals were purchases for resale and, as such, were exempt from sales tax. It takes the position that the Service Loaner Policy was a legally binding agreement arising from the purchase agreement between W-H and the buyer; stated differently, the right to receive a loaner car was a component of what was bought and sold under the purchase agreement.

25. The Division concedes that the Thrifty charges would be purchases for resale if the charges were incurred to satisfy a contractual obligation under the terms of the purchase agreement, but the Division takes the position that W-H was not legally obligated to provide a rental car under the purchase agreement. Therefore, its policy of providing a rental car was merely a way of promoting customer satisfaction and thus increasing sales.

26. The Division introduced the affidavit of one of its employees, a sales tax auditor who assisted in W-H's audit. In the affidavit, the auditor states that she purchased a car in August of

2000 from a related dealership and was told by the salesman that he was unaware of a loaner policy and that she was not provided with a loaner policy statement. Her affidavit is irrelevant since her purchase occurred outside the audit period from a related dealership and not from W-H.

27. The audit supervisor testified that he reviewed about 30 dealer jackets during the audit and did not remember seeing signed loaner policy statements. He could not testify with certainty that there were none. There is ample evidence in the record to support the findings of fact made here regarding W-H's loaner policy including the credible testimony of W-H's witnesses and copies of the loaner policy statements. Moreover, the relatively large amounts expended by petitioner for rental cars (\$30,000 to \$40,000 per month) is evidence of the existence of a loaner policy. Accordingly, to the extent that the Division's witness testimony raises questions about the very existence of a loaner policy, that testimony has been disregarded.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1105(c) imposes a sales tax on receipts from every sale, except for resale, of a variety of services including the service of installing, maintaining or repairing tangible personal property (Tax Law § 1105(c)(3)). A retail sale, as pertinent here, is defined in Tax Law § 1101(b)(4) as “[a] sale . . . for use by [any] person in performing the services subject to tax under [Tax Law § 1105(c)(3)].” The term “resale” is not defined in the Tax Law. However, the regulations of the Commissioner of Taxation and Finance address the question of when services are purchased by a vendor for resale. 20 NYCRR 526.6(c)(1) provides as follows:

Where a person, in the course of his business operations, purchases tangible personal property or services, which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

Section 527.5 addresses the question of when services provided under a warranty agreement are subject to sales tax. It states:

(d) Warranty work.

(1) Repair or maintenance services rendered, without charge to a customer under a warranty agreement are not taxable.

(2) The vendor performing the warranty services may purchase for resale any tangible personal property which is transferred to his customer in connection with the services rendered.

(3) Charges for services rendered which are not covered by the warranty are taxable.

(4) Where a manufacturer reimburses a vendor or repairman performing warranty work, the reimbursement is not taxable, as it was for resale.

B. In *Matter of Burger King v. State Tax Commn.*, (51 NY2d 614, 435 NYS 2d 689), the Court held that the resale exclusion must be interpreted so as to bring it “within the spirit underlying our sales tax law, which is to impose the tax only upon the sale to the ultimate consumer, at which time the price paid for the taxable item would presumably be at its highest” (*id.*, 435 NYS2d at 693). The Division's regulations reflect this spirit of the sales tax law. The customer who has paid for a warranty agreement (either standing alone as with the extended service plan or as a component of a new car purchase) has purchased an item at retail. Presumably, the overall cost of the car and warranty exceed the wholesale value of the car and warranty agreement. Since the consumer has paid for the warranty service as a component of the retail sale of the car, no tax is imposed when a warranty service is performed. Moreover, the manufacturer's reimbursement to the servicing dealer is not taxable inasmuch as the transaction is a sale for resale to the consumer.

C. W-H sold cars at retail. The purchase price of the car included the car itself and a basic three-year warranty provided by Ford. The entire charge for the car and the warranty was subject to sales tax at the time of the sale. Services performed under the warranty were not subject to sales tax because the charge for that service was included in the retail price of the

automobile. Charges for service not covered by the warranty were subject to sales tax. The parties agree that loaner cars were not provided under the terms of the basic warranty.

Nonetheless, petitioner argues that the purchase price of a new car included the right to be provided with a loaner car and, therefore, that its own Thrifty car rentals were purchases for resale. The essence of petitioner's argument is that W-H made an unconditional promise to provide each of its new car buyers with a loaner car in return for the customer's purchase of a car from W-H. It may be that the promise of a loaner car was an inducement to purchase from W-H. However, in the context of the sales tax, the question is whether the right to a loaner vehicle was included in the purchase price of the automobile. I find that petitioner has not carried its burden of proof to show that it was.

D. A vendor's invoices may provide reliable evidence of the true nature of a transaction and the taxable status of that transaction (*see, Matter of U-Need Roll Off Corp. v. New York State Tax Commn.*, 67 NY2d 690, 499 NYS2d 921). The purchase agreement was a form of sales invoice, and it is the only written evidence of the terms of the sale agreed to by the parties. The purchase agreement includes an itemization of the charges incurred by the new car purchaser. The preprinted form includes spaces to show the price of the car minus trade-in credit and discounts, additional charges for the purchase of an extended service plan, inspection fees, processing application fee, and taxes. On the purchase agreement entered in evidence, the basic warranty is listed as a component of the overall sale. The service loaner policy is not a separately stated item on the invoice, and the invoice makes no mention of the obligation to provide a service loaner. Section 5 of the purchase agreement contains an explicit disclaimer of all warranties "except as otherwise provided in writing by YOU in an attachment to this agreement or in a document delivered to ME when the vehicle is delivered." A copy of petitioner's Service Replacement Policy was delivered to the new car purchaser at the time the

vehicle was delivered to the customer.<sup>3</sup> However, the Service Replacement Policy does not state that it was intended to be an additional warranty or contractual term under the purchase agreement. The Service Replacement Policy statement is not signed by a representative of W-H. It sets forth the obligations of a customer wishing to obtain a loaner car, but it does not explicitly set forth the obligations of W-H regarding the loaner car. The loaner policy and the purchase agreement do not reference each other. Nothing in these documents establishes that the right to a loaner car was a component part of what was bought and sold. In short, there is no evidence in these two documents that the loaner policy was a component of the retail sale.

E. While petitioner acknowledges that neither the purchase agreement nor the Service Replacement Policy statement, standing alone, obligates petitioner to provide a loaner car, it argues that when the two documents are read together they show that W-H was contractually obligated to provide a loaner car to new car buyers. Its argument for reading the documents together relies on a longstanding rule of contracts first articulated in *Crabtree v. Elizabeth Arden Sales Corp.* (305 NY 55, 56) where the Court stated: “we now definitively adopt [the rule], permitting the signed and unsigned writings to be read together, provided that they clearly refer to the same subject matter or transaction.” The Court went on to state that all of the terms of the contracts must be set out in the writings presented; that the writing establishing a contractual relationship must be signed by the party charged with violating the contract; and that “the unsigned document must *on its face* refer to the same transaction as that set forth in the one that was signed” (*id.*; emphasis added).

Here, the unsigned document, the Service Replacement Policy statement, does not refer back to the new car purchase agreement. It in no way indicates that it is intended to be a

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<sup>3</sup> The Division's discussion of whether the policy statement was physically attached to the agreement will not be addressed here since it is irrelevant in view of the use of the term “delivered” in the purchase agreement.

clarification of the purchase agreement or an additional term of the sale. It does not explicitly state that W-H has agreed to provide a loaner car as a term of the purchase agreement. It is entitled a "Policy" and not an agreement. In signing it, the buyer acknowledges that he or she has read the document, but nothing more. Paragraph 2 merely states: "*Privileges* will remain in effect for the term of your New Vehicle's basic warranty" (emphasis added), clearly implying that the use of a loaner car is a privilege granted by W-H and not a contractual obligation. Moreover, the fact that the purchase agreement includes a disclaimer of all warranties not included in the agreement is fatal to petitioner's case. With the disclaimer in effect, only a writing explicitly setting forth an additional term of the purchase agreement can be considered to be an additional term of the sale.

In short, I find that the purchase price of a new car did not include a right to be provided with a loaner car; consequently, the Thrifty car rentals were not purchases for resale.

F. The petition of West-Herr Ford, Inc. is denied, and the Notice of Determination, dated March 13, 2001, is sustained.

DATED: Troy, New York  
September 12, 2002

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE